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Heart Transplants: Legal Obstacles to Donation

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HEART TRANSPLANTS: LEGAL OBSTACLES TO DONATION

Medical history was made in December, 1967 when the world's first heart transplantation was performed in Capetown, South Africa. In the short period which has followed, so many heart transplantations have been performed in various parts of the world that the operation is no longer front page news. If the number of operations continue to be performed at the present pace, it will not be long before heart transplantations become a common surgical practice. However, before heart surgeons can perform transplantations on a widespread scale in the United States, lawyers will have to remove legal obstacles that stand in the way of effective heart transplantation. The legal obstacles center around the right of persons who want to donate their hearts for transplantation after death and the rights of their survivors.

The purpose of this article is to show how the laws of donation in this country are behind the recent medical advances in heart transplantation. Ways in which the laws can be updated so as to encourage heart transplantation will be surveyed.

It is not unreasonable in light of some of the recent successful transplantations to be optimistic as to the future of heart transplants. Dr. Charles Hufnagel, Director of Surgical Research at Georgetown University Medical Center, said in a recent interview,[1] "A human-heart transplant is not, actually, as complex an operation as many others that we do every day." He noted that the major problem is the immunity reaction. The immunity reaction occurs when a person's body reacts to a foreign tissue, such as a transplanted heart, by "rejecting" it. The body sends out white cells, called lymphocytes, to destroy the cells of the foreign tissue. To counteract the "rejection" problem, the physician will destroy some of the white cells. However, in doing so he reduces the resistance of the patient's body to diseases. The world's first heart transplant patient, Louis Washkansky, died of pneumonia because his resistance was reduced to such an extent that his body could not cope with the infection. Nothing went wrong with his newly transplanted heart.[2]

The longest period of sustained life after a heart transplantation is three years. The recipient, however, was a dog.[3] In comparing the length of time that a dog survived with how long a human can survive a heart transplantation, it is to be noted that a dog has a life expectancy of about one-fifth that of a human. The handwriting is on the wall that in the not-too-distant future heart transplantation will reduce heart disease as the leading cause of death.

1 U.S. News & World Report, Jan. 22, 1968, p. 59.
2 N.Y. Times, Jan. 21, 1968, p. 59.
3 *Supra* note 1.

A sufficient number of donated hearts must be made available before heart transplantation becomes a common surgical practice. However, the problem does not appear to be unwilling donors. A recent Gallup poll[4] indicates that seven adult persons in every ten, or a projected 80 million Americans, would be willing to donate their hearts for transplantation upon their deaths. The problem is that the laws of donation in this country do not foster heart transplantation.

Obstacles to Donation

The world's first successful heart transplant patient, Philip Blaiberg, has survived a number of months after his transplantation on January 2, 1968 in Capetown, South Africa. All the medical factors indicated that the transplantation would be successful. The donor and recipient had the same blood types and similar heart capacities. The donor's heart was healthy and was transplanted immediately after his death.[5] But, in spite of the favorable medical factors, the operation could not have been performed in the United States unless the surgeons who removed the donor's heart were willing to subject themselves to a lawsuit by the donor's spouse.

The donor, Clive Haupt, a 24 year-old mulatto, died without having made a testamentary disposition of his body. However, the South African surgeons got his mother's permission to remove his heart; the wife of the deceased was too distraught to consent to the transplant.[6] In the United States, the wife could have recovered against the surgeons in a tort action for mental distress caused by the intentional mutilation of her husband's body.[7] She had the right as surviving spouse to the possession and control of her deceased husband's body. The mother's consent would not have been sufficient since the wife had the superior right under American law. The leading case in Illinois, which adopted the general rule, states:

> It is generally conceded that on the death of a husband or wife the primary and paramount right to the possession of the body and to the control of the burial or other legal disposition thereof is in the surviving spouse and not in the next of kin, in the absence of a different provision by the deceased.[8]

However, the fact that the surviving spouse's permission is necessary in this country is not necessarily a legal obstacle standing in the way of heart transplantation. The deceased donor in the Blaiberg transplantation

4 N.Y. Times, Jan. 17, 1968, p. 18.

5 N.Y. Times, Jan. 3, 1968, p. 1.

6 N.Y. Times, Jan. 7, 1968, § 4, p. 9.

7 See generally 12 A.L.R. 342, 346 (1921), where it is said, "The wrongful dissection of a dead body is regarded as a wilful and intentional wrong against the person entitled to the control of the body for burial, and a recovery may be had for the mental anguish resulting from the mutilation. . . ."

See also Palenzke v. Bruning, 98 Ill. App. 644 (1st Dist. 1901).

8 Fischer's Estate v. Fischer, 1 Ill. App. 2d 528, 533, 117 N.E.2d 855, 858 (st Dist. 1954).

had not provided for the disposition of his body by will or otherwise. In such circumstances, one of the survivors should have the right to decide whether the deceased's heart should be removed. Failure of the deceased to make a testamentary disposition of his body does not necessarily mean that his intention was that his heart be left intact. Such a negative inference cannot be drawn, and especially in this case, since the deceased was only 24 years old and died unexpectedly. Consequently, the survivor who was closest to the deceased in love and affection at the time of his death should act as his representative and decide if his heart can be removed. The law has to draw the line by designating which survivor's consent is required. The American rule which gives the surviving spouse the right, rather than the next of kin, is proper because the surviving spouse is presumedly closest to the deceased at the time of his death.

COMMON LAW

Legal problems arise in the United States when a person wants to donate his heart for transplantation to take effect at his death. The lack of certainty and uniformity among state laws on the testamentary disposal of body parts is the major legal obstacle standing in the way of effective heart transplantation in this country. The origin of the problems is the common law. A recent annotation[9] discusses the common law background as follows:

> Under the early English common law, no rights of property in a dead body were recognized.[10] From this it followed, quite logically, that a dead body could not be the subject of a testamentary bequest, and a testator's directions for the disposal of his remains were merely a request without probative effect.
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> Although the English rule that no right of property existed in a dead body was originally adopted in this country,[11] courts recognized quite early that although a corpse was not property in a commercial sense, it possessed many of the attributes of property, and was frequently described as "quasi-property."[12]

Courts developed the "quasi-property" interest theory so that the nearest relatives of the deceased, who have the duty to bury their dead, would have correlative rights in the dead bodies.[13] The rights include the right to possession and control of the body for burial and the right to have the body remain in its final resting place. In an early case in this country,[14] an equity court was faced with a dilemma due to the common law rule that there are no rights of property in a dead body. Under the traditional con-

9 Annot., 7 A.L.R.3d 747, 748 (1966).

10 Reg. v. Sharpe, 169 Eng. Repr. 959 (1857); Williams v. Williams (Eng.), 20 Ch. Div. 659 (1881).

11 Meagher v. Driscoll, 99 Mass. 281 (1868); Findley v. Atlantic Transport Co., 220 N.Y. 249, 115 N.E. 715 (1917).

12 Spiegel v. Evergreen Cemetery Co., 117 N.J.L. 90, 186 Atl. 585 (1936); Pierce v. Swan Point Cemetery, 10 R.I. 227, 14 Am. Rep. 667 (1872).

13 14 Clev. -Mar. L. Rev. 442 (1965).

14 Pierce v. Swan Point Cemetery, *supra* note 12.

cept of equity jurisdiction, an equity court would only decide cases involving rights in property. In *Pierce v. Swan Point Cemetery*,[15] survivors brought an action against a cemetery for removing the remains of their deceased to another burial ground. Equitable relief was sought to have the cemetery reinter the deceased in the original burial ground. The court got around the dilemma by holding that the survivors had a "quasi-property" interest in the deceased's body.

The so-called "quasi-property" interest, however, is vested in the survivors. At common law, a person does not have a property interest, quasi or otherwise, in his own dead body. The deceased's representative cannot enforce a testamentary disposition made by the deceased prior to his death which is contrary to the wishes of the survivors.[16]

> In the absence of specific statutory authority, a person has, at best, a very qualified assurance that the testamentary disposition that he makes of his own body will be fulfilled. This appears particularly true if his will provides for disposition by some means other than interment. And the chances against fulfillment become vastly greater if he desires to donate his body, or parts thereof, for scientific or medical purposes.[17]

States Without a Donation Statute

Within the last few years, many states have enacted statutes to overcome the common law rule so that persons can make valid testamentary dispositions of their bodies or parts thereof.[18] In those states that have not enacted donation statutes, the surgeons cannot be sure that an attempted testamentary disposition would be upheld by the courts. If a daring surgeon were to remove a heart from a donor who had authorized the gift prior to his death, he could be forced into a lawsuit by the donor's surviving spouse or next of kin. The court, in such a case, might hold for the survivors by applying the common law rule or might hold for the surgeon because he acted in good faith in carrying out the wishes of the deceased-donor. The possibility of a lawsuit and a decision adverse to the surgeon, however, would discourage heart transplantation in these states.

States With a Donation Statute

However, all problems are not resolved in a state which has enacted one of the recent donation statutes. The statutes were passed as a response to successful kidney and corneal transplants; they were not passed with heart transplants in mind. As a result, the current statutes do not cover many legal quandaries raised by successful heart transplantation. The Il-

15 *Ibid.*

16 14 Clev. -Mar. L. Rev. 442 (1965).

17 Annot., 7 A.L.R.3d 747, 748 (1966).

18 A list of those states where a donation statute has been enacted can be found in 21 U. Pitt. L. Rev. 523 (1960). See also: 19 Ohio St. L.J. 455 (1958).

linois Gift of Body Act[19] is a typical donation statute and contains the provisions found in the statutes of most jurisdictions. It provides that a person 18 years or older can give his body or parts thereof to any approved medical institution. The gift must be in the form of a will, or by a written instrument attested to by two witnesses. The instrument becomes effective immediately upon the donor's death and can be revoked by him at any time before his death.

The accompanying chart is a comparison of the donation statutes of seven of the largest states. No two statutes are exactly alike. The Illinois and Florida statutes, however, provide examples of the two extremes in current donation statutes. Illinois requires that the donation be perfected according to the formalities of the Statute of Wills. The donor must be at least 18 years old, and the donation must be in a writing attested to by two witnesses. Florida permits any person to execute a donation in the form of wallet cards. The Illinois statute allows the donor to leave his body or parts of his body to a hospital, medical school, or other medical institution. Florida allows a disposition to a specific individual as well as to a medical institution.

The statutes of most of the other states resemble the Illinois statute, whereas the Florida statute[20] is unique in being comprehensive and the only one that specifically mentions the word, "transplantation." Many questions remain unanswered in a state with a donation statute like that of Illinois.

19 Ill. Rev. Stat. ch. 3, § 42a (1967).

20 Fla. Stat. ch. 736.18 (1964). Selected sections:

(1) Any person may donate or bequeath to another person any part of his body for grafting or transplantation by written instrument or by his last will and testament, and may further by such written instrument or his last will and testament donate and give his body or any part thereof for experimentation and scientific research purposes.

(5) Said written statement (sample form provided in § 4) need not be witnessed or acknowledged, and the donor may execute more than one copy thereof. The written statement may be in the form and size of wallet cards. No particular form or wording shall be necessary and said written instrument or last will and testament shall be liberally construed to effectuate the intended purpose of the person wishing to make any such donation or devise. . . .

(6) All hospitals, doctors, surgeons, civic clubs, welfare organizations and the state board of health are hereby authorized to prepare and make available for free use and distribution copies of such written instrument and copies of this act.

(9) Said written instrument or said last will and testament shall be full authority for any such bank, hospital, medical school, physician or surgeon to act and proceed under the terms of any such written instrument or last will and testament. No consent or permission from the personal representative or the heirs of the deceased shall be required for such bank, hospital, medical school, physician or surgeon to so proceed and act under the terms of this act.

(10) The judgment by an court of competent jurisdiction declaring any such written instrument or last will testament to be invalid shall not create a liability against such bank, hospital, medical school, physician or surgeon who acts and proceeds under the terms and provisions of any such written instrument or last will and testament.

(11) All donations and devises for the furtherance and purposes of this act shall constitute a charitable public trust for the welfare and benefit of the public and as such shall be exempt from all taxation.

COMPARATIVE DONATION STATUTES

	Citations	Age of Donor	Permitted Donees	Permitted Uses	Revocation
Ill.	Ill. Rev. Stat. ch. 3, § 42a (1967).	18	Hospitals, schools, & medical institutions.	As expressly provided by donor or as institution sees fit.	Yes
N.Y.	N.Y. Public Health Laws § 4201 (1967).	18	Hospitals, body banks, & individuals.	Advancement of science or replacement of injured parts of body.	Yes
Penna.	Penna. Health & Safety Code § 5001 (1964)	Any	Non profit body banks	None specified	?
Mich.	Mich. Public Health Stat. § 14. 523(1)a (1968).	21	Medical or educational institutions or any individuals.	As specified by donor or for medical purposes.	Yes
Calif.	Calif. Health & Safety Code § 7100 (1967).	Any	Hospitals, schools & body banks.	None specified	?
Wisc.	Wisc. Public Health Code § 155.06 (1968).	21	Medical schools & body banks.	Scientific, medical, or educational purposes.	Yes
Fla.	Fla. Statute ch. 736.18 (1964).	Any	Hospitals, medical institutions, & individuals.	Transplantation and/or Medical research.	?

The first question that arises is what if a donor wants to leave his heart to an individual rather than a medical institution? For example, a person may be dying of a disease which has not affected his heart, and he wants to leave his heart for transplantation to a relative or friend who has a defective heart. The statutes of most states, including Illinois, allow donations to medical institutions only. The surgeon would be holding himself open to a lawsuit by the survivors if he proceeded to transplant the heart to an individual donee named by the donor. The court might hold for the surgeon because he acted in good faith in carrying out the donor's wishes. However, the problem is the threat of a lawsuit, not the possible outcome. Heart surgeons would not be encouraged to perform heart transplantations on individual donees named by the donor because of the fear of legal action after the operation.

The second question is who is to get a donated heart if the donor fails to name a specific donee or the specified donee is incapable of taking the heart for transplantation? The statutes of most states, including Illinois, do not provide for this contingency. It is possible that the surviving spouse or the next of kin has the right to name the donee since they have the right to control the disposition of the body when the deceased failed to provide for its disposition.[21] However, to wait for the survivors to name a donee would be undesirable for heart transplantations since a transplantation must be made within a few hours after the donor's death under current requirements. As a result, it would be impracticable to wait for the survivors to make a selection in sufficient time. Again, the surgeon would be holding himself open to a lawsuit by the donor's survivors if he went ahead and selected the donee for transplantation by himself.

The third question is how are the wishes of the donor to be communicated so that a transplantation can be made immediately after his death? It is important that the donor's heart be removed within a few hours after his death. The problem would arise, however, where a donor is rushed to a hospital and the hospital or attending physician is unaware that the patient is a heart donor. Most statutes provide for disposition of body parts by will or other attested writing. Consequently, the deceased's attorney might be the only person who knows that his client is a heart donor. Usually the attorney is not contacted until a day or two after his client's death. The donor's heart could not be used in a transplantation after that length of time.

The fourth question is should the donor be allowed to receive consideration for promising to leave his heart to someone after death? Whether the supply of hearts for transplantation should be put on an economic basis is a question of public policy. Should persons suffering from heart defects, who are in a good position financially, be allowed to go into the market and

[21] See text at note 8 *supra*.

purchase hearts needed for transplantation? A "black-market" in human hearts may be formed since persons would be willing to pay a high price to save their lives with transplanted hearts. Most state statutes are silent on this question. Applying general contract law, it would appear that a promise, supported by consideration, to leave property to someone after death is enforceable. However, it is questionable whether a promise to leave a person's heart after death is enforceable as a contract because no right of property exists in a dead body at common law.[22]

The fifth and final question is should the transfer of a heart to an individual donee be subject to estate and inheritance taxes? Since the decedent authorized the transfer of his heart after death to a specified donee, the transfer could be considered subject to estate taxation and the specific bequest subject to inheritance taxation. Of course, in cases where the heart is given to a hospital or other medical institution, the charitable exemptions would apply. However, as in the previous question, it is questionable whether any transfer of a heart would be subject to death taxes because no right of property exists in a dead body at common law.

Removing the Obstacles to Donation

As long as the foregoing questions remain unanswered, heart transplantation will be tied in a legal straight-jacket. The law of donation must be certain. Otherwise, surgeons would be discouraged from performing transplantations for fear they would be subjected to lawsuits by the donor's survivors. Since time is essential to a successful heart transplantation, surgeons cannot be expected to wait for a legal opinion before they proceed with a transplant.

In order to minimize the uncertainties of the law, the questions should be answered by the state legislatures. Most of the states, including Illinois, can do so by amending their present donation statutes. In those states without a donation statute, one will have to be enacted. The comprehensive Florida statute[23] provides a good framework for reference.

(1) What if a donor wants to leave his heart to an individual rather than a medical institution?

If some one wants to donate his heart, he should be allowed to name an individual donee who is to receive his heart for transplantation upon his death. A person should be able to name a relative or friend suffering with a defective heart whom the donor would like to have restored back to health. Only the statutes of Florida,[24] New York,[25] and Michigan[26] allow a disposition to an individual donee. Other states, including Illinois, can

22 See text at note 9 *supra.*
23 *Supra* note 20.
24 *Ibid.*
25 N.Y. Public Health Laws, § 4201 (1967).
26 Mich. Public Health Stat., § 14.523(1) (1968).

eliminate this problem by amending their current donation statutes to allow donations to individuals as well as to medical institutions.

The law of trusts could provide the legal machinery for donation to specific individuals. When a donor selects someone he wants to receive his heart for transplantation, he should discuss the possibility of a donation with the donee's physician. The physician could determine if the donor and donee's hearts are compatible for transplantation. If they are, the donor could appoint the physician as trustee for the donee. A medical expert, therefore, would be charged with responsibility for all phases of the transplantation upon the donor's death.

(2) Who is to receive a donated heart if the donor fails to name a specific donee or the specified donee is incapable of taking the heart for transplantation?

The New York statute[27] provides that when a donee is not specified or is incapable of taking the donated body part, the hospital where the donor dies has the right to dispose of the body part. Other states can add a similar provision to their donation statutes to provide for this contingency.

Another possible solution is the creation of a government-controlled dispensing agency. The agency could keep a record of all prospective donees with information of their blood types, surgeons' names, and other medical data. Where a donor dies, without specifying a donee, the hospital could immediately notify the agency that it has an available heart for transplantation. The agency could then match the characteristics of the donor with the information in the donees' file and select which donee should receive the heart on the basis of heart compatibility and proximity of the donee to the location of the hospital. Computerized applications could speed the selection process.

(3) How are the wishes of the donor to be communicated so that a transplantation can be made immediately after his death?

The Florida statute[28] provides a solution to such a communications problem. The donor may carry a small card in his wallet that indicates that he is a heart donor. Other states can add a similar provision to their donation statutes and eliminate the formality of attestation. Other problems would be overcome if the card provided the name and phone number of the physician, who is the trustee for a specific donee, to be contacted. If the donor did not mention a specific donee, the card could contain an authorization for the hospital to dispose of the heart as needed for transplantation.

(4) Should the donor be allowed to receive consideration for promising to leave his heart to someone after death?

27 *Supra* note 25.
28 *Supra* note 20.

To prevent a "black-market" in human hearts, it is desirable that donation statutes forbid a person from selling his heart to a specific individual or to a medical institution. The New York statute[29] provides that a person cannot receive consideration for disposing of parts of his body. A similar provision can be added to the donation statutes of other states. Criminal sanctions must be added to discourage violations of such a provision by middlemen who want to establish a "black-market" in human hearts.

(5) When the donor gives his heart to an individual rather than a charitable institution, should the transfer be subject to estate and inheritance taxes?

The Florida statute[30] takes care of any state taxation problem by declaring that all donations, whether to individuals or medical institutions, are exempt from taxation. Other states can put to rest inheritance tax problems by enacting a similar provision. Congress may also have to enter the field to prevent the Treasury Department from holding that a transfer of a heart to an individual donee is subject to estate taxation.

When Is a Person Dead?

Since the successful Blaiberg transplantation, articles in recent periodicals[31] have exploited the fanciful situation of a surgeon being held for murder after removing a person's heart before the person was legally dead. The possibility exists when a patient is in terminal coma. Terminal coma is a condition in which a patient's brain is not functioning, but his body can be kept "alive" for a short time with a respirator which takes the place of the patient's brain. The patient's heart can continue to function for days as long as the respirator is attached. For all practical purposes, however, the patient is dead because his brain cannot be revived, and his heart can function for only a few days with a respirator.[32]

As long as the respirator is attached to the patient, he is considered alive because, under the traditional definition,[33] a person is not considered dead until his heart stops beating and cannot be revived. Therefore, the situation could arise where a surgeon, needing a heart for transplantation, turns off a respirator and removes the heart of the patient in terminal coma. Adherence to the traditional definition of death as "death of the heart" would forbid the surgeon from turning off the respirator until the patient's heart stopped of its own accord.

On the other hand, it has been suggested that the definition of death be changed so that a person is considered dead when his brain stops func-

29 *Supra* note 25.
30 *Supra* note 20.
31 Trial, December/January 1967-68, p. 48; N.Y. Times, January 12, 1968, p. 16.
32 *The Dead Body & the Living Brain*, Look, November 28, 1967, p. 99.
33 Smith v. Smith, 229 Ark 579, 317 S.W.2d 275 (1958).

tioning. A change from "death of the heart" to "death of the brain" would give surgeons a free hand in deciding what to do with patients who are being kept "alive" with a respirator while in terminal coma. Since the patient would be considered dead when his brain stopped functioning, the surgeon could turn off the respirator even though the heart was still beating.

A recent law review article discusses the change to "death of the brain" as the definition of death.[34]

> . . . In the United States, proponents of reform have urged the cessation of brain activity—as evidenced by a flat electroencephalograph (EEG) reading—as the criterion of death. Setting the moment of legal death prior to the stilling of the heart is critical to those pressing for greater flexibility in transplanting vital organs from doomed patients to those with greater hopes of recovery. Waiting until the heart fails makes transplanting difficult, if not impossible. At stake in the pursuit of a legal definition of death is the prospect of a vast increase in the supply of kidneys and some day, of livers, hearts, and ovaries for the purpose of transplanting.

However, all doctors do not agree that a person should be considered dead when his brain stops functioning. Dr. Henry K. Beecher, noted professor of anaesthesia at Harvard Medical School, said in a recent interview,[35] "any up-dating of the moment of death would be a legal impossibility at this time." Similarly, the Conference of Commisioners of Uniform State Laws has not attempted to give "death" a legal definition in their proposed uniform gift-of-tissue act. The reason given is that medical science itself is uncertain as to the exact point at which a failing person dies.[36]

Conclusion

The uncertainties in the law of heart transplantation can be remedied to a large extent if the donation statutes of the states provided clear-cut answers to the questions raised. The ideal would be uniformity among all the states on the law of donation. For example, a uniform law would put to rest conflicting state laws on the formalities necessary for a valid donation. It would be absurd if a heart transplantation could not be performed because a donor happened to die in a hospital in state X which requires a document attested to by two witnesses, but the donor had signed an unattested instrument which was valid in state Y.

Currently, a committee of the Conference of Commissioners of Uniform State Laws is preparing a model law to be submitted to all the state legislatures next year.[37] Under the direction of Prof. E. Blythe Stason of Vanderbilt Law School, the committee has been working two and one-half years to draft a uniform gift-of-tissue act. Hopefully, the uniform law would

34 42 Wash. L. Rev. 999 (1967).
35 Trial, December/January 1967-68, p. 48.
36 N.Y. Times, January 7, 1968, § 4, p. 9.
37 N.Y. Times, January 17, 1968, p. 19.

provide clearcut answers to the problems raised in this article. To encourage heart transplantation, all of the state legislatures should adopt the proposed uniform law. Thereby, lawyers will have paved the way so that legal obstacles are not blocking the surgeon's lifesaving work.

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